Supreme Court, U.S.
FILED

021170 JAN 29 2003

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC TEST AND ODELIA BRAUN,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRADLEY SCOTT SHANNON
Counsel of Record
UNIVERSITY OF IDAHO
COLLEGE OF LAW
Sixth and Rayburn Streets
P. O. Box 442322
Moscow, ID 83844-2322
(208) 885-6541

56 pp

QUESTIONS PRESENTED

1. Whether *United States v. Gilmore*, 372 U.S. 39 (1963), in which the Court held that the determination whether an expense is business or personal (and therefore whether it is deductible for federal income tax purposes) depends upon the "origin and character of the claim" that gave rise to that expense (rather than the reasons why the expense was incurred), should be overruled.

2. Whether federal circuit court rules depriving "unpublished" decisions of binding precedential effect and prohibiting citation thereto violate the United States Constitution and exceed those courts' rule-making power as prescribed in 28 U.S.C. § 2071 (2000) and Federal Rule of Appellate Procedure 47.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

TABLE OF APPENDICES x

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Cases: Page

Anastasoff v. United States, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000) 16

County of Los Angeles v. Kling, 474 U.S. 936 (1985) 20

Dolese v. United States, 605 F.2d 1146 (10th Cir. 1979) 11

Frazier v. Heebe, 482 U.S. 641 (1987) 20

Hanna v. Plumer, 380 U.S. 460 (1965) 20

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) 15

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) 12, 16, 17

Kopp's Co. v. United States, 636 F.2d 59 (4th Cir. 1980) 11

Kornhauser v. United States, 276 U.S. 145 (1928) 12

Lykes v. United States, 343 U.S. 118 (1952) 10, 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 18

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 18

Re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36 (10th Cir. 1992) 16

Roe v. Wade, 410 U.S. 113 (1973) 18

Cases Continued: Page

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 20

Suboh v. City of Revere, 141 F. Supp. 2d 124 (D. Mass. 2001), *aff'd in part and rev'd in part on other grounds sub nom. Subah v. District Attorney's Office*, 298 F.3d 81 (1st Cir. 2002) 16

Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found, 277 F.3d 1361 (Fed. Cir.), *cert. denied*, 123 S. Ct. 113 (2002) 14, 17

United States v. Generes, 405 U.S. 93 (1972) 11, 12

United States v. Gilmore, 372 U.S. 39 (1963) ..... *passim*

Williams v. Dallas Area Rapid Transit, 256 F.3d 260 (5th Cir.), *cert. denied*, 122 S. Ct. 618 (2001) 16

Woodward v. Commissioner, 397 U.S. 572 (1970) 9

United States Constitution:

U.S. Const. art. III 1, 16, 18

U.S. Const. amend. I 18

U.S. Const. amend. V 18

Statutes: Page

26 U.S.C. § 62 (2000) 4

26 U.S.C. § 63 (2000) 5

26 U.S.C. § 67 (2000) 5

26 U.S.C. § 162 (2000) 1, 2, 3, 4

26 U.S.C. § 212 (2000) 2, 3

26 U.S.C. § 262 (2000) 2

26 U.S.C. § 6213 (2000) 5

26 U.S.C. § 6214 (2000) 5

28 U.S.C. § 1254 (2000) 1

28 U.S.C. § 2071 (2000) 1, 2, 8, 19, 20

28 U.S.C. § 2072 (2000) 19, 20

Rules:

Sup. Ct. R. 13.1 1

Sup. Ct. R. 13.3 1

Fed. R. App. P. 47 . . . . . 2, 8, 19, 20

D.C. Cir. R. 28 13

Rules Continued: Page

D.C. Cir. R. 36 12

1st Cir. R. 36 . . . . . 12, 13

2d Cir. R. 0.23 . . . . . 12, 13

3d Cir. I.O.P. 5.3 12

3d Cir. I.O.P. 5.8 13

4th Cir. R. 36 13

5th Cir. R. 47.5 . . . . . 12, 13

6th Cir. R. 28 13

6th Cir. R. 206 12

7th Cir. R. 53 . . . . . 12, 13

8th Cir. R. 28A 13

8th Cir. R. App., Plan for Publication of Orders, ¶ 3. 12

9th Cir. R. 36-1 . . . . . 2, 6, 7

9th Cir. R. 36-2 . . . . . 2, 6

9th Cir. R. 36-3 . . . . . *passim*

9th Cir. R. 36-4 . . . . . 2, 7

Rules Continued: Page

9th Cir. R. 36-5 2

9th Cir. R. 36-6 2

10th Cir. R. 36.3 ..... 12, 13

11th Cir. R. 36-2 ..... 12, 13

Fed. Cir. R. 47.6 ..... 12, 13

Other Authorities:

Jennifer Adams, Comment, *Law Today; Gone Tomorrow*, 53 Baylor L. Rev. 659 (2001) 19

Administrative Office of the United States Courts, *Judicial Business of the United States Courts 2001* (2002) .. 13

Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002) 14

1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* (3d ed. 1999) 9

Marvin A. Chirelstein, *Federal Income Taxation* (8th ed. 1999) 8, 10

Brian E. Comerfort & Mason J. Sacks, *Federal Tax Deductions* (1983) 11

Other Authorities Continued: Page

Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570 (2001) 18

E. Allen Farnsworth, *An Introduction to the Legal System of the United States* (3d ed. 1996) 15

Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001) 17

Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287 (2001) 18

Douglas P. Krause, Note, *The Deductibility of Legal Expenses*, 82 Colum. L. Rev. 392 (1982) 9, 11

Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994) 18

Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 Notre Dame L. Rev. 135 (2001) 17

Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535 (2000) 17, 18

Other Authorities Continued: **Page**

Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81 (2000) 16

Timothy A. Rodgers, Note, *The Transaction Approach to the Origin of the Claim Doctrine: A Proposed Cure for Chronic Inconsistency*, 55 Brook. L. Rev. 905 (1989) . . 11

Edward J. Schnee & Nancy J. Stara, *The Origin of the Claim Test: A Search for Objectivity*, 13 Akron Tax J. 97 (1997) 9

Jon A. Strongman, Comment, *Unpublished Opinion, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. Kan. L. Rev. 195 (2001) 18

The Supreme Court, 1962 Term – Leading Cases, 77 Harv. L. Rev. 152 (1963) 9

Lance A. Wade, Note, Honda *Meets* Anastasoff: *The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695 (2001) 18, 19

TABLE OF APPENDICES

Page

Appendix A – Order Of The Court Of Appeals For The Ninth Circuit Dated November 12, 2002 ..... 1a

Appendix B – Memorandum Of The Court Of Appeals For The Ninth Circuit Dated October 1, 2002 ..... 3a

Appendix C – Opinion Of The United States Tax Court Dated November 27, 2000 ..... .6a

Appendix D – Constitutional Provisions, Statutes, And Rules Involved In The Case ..... .18a

Petitioners Eric Test and Odelia Braun respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Neither the memorandum disposition of the Court of Appeals for the Ninth Circuit (Pet. App. 3a-5a) nor that court's order denying Petitioners' request for publication (Pet. App. 1a-2a) are officially reported. The opinion of the United States Tax Court (Pet. App. 6a-17a) is reported at T.C.M. (RIA) 2000-362 (2001).

STATEMENT OF JURISDICTION

The initial judgment of the Court of Appeals for the Ninth Circuit was entered on October 1, 2002. The court of appeals' order denying Petitioners' request for publication was entered on November 12, 2002. On December 23, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 29, 2003.[1] This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

Question One of this Petition principally involves 26 U.S.C. (I.R.C.) § 162(a) (2000). This statute is reproduced in Appendix D (at Pet. App. 18a-19a).

Question Two principally involves Article III, section 1, clause 1 of the United States Constitution; 28 U.S.C. §

---

[1] Because Petitioners also are seeking review of the court of appeals' November 12, 2002 order denying their request for publication, it seems probable that the deadline for the filing of this Petition actually is February 10, 2003, that date being 90 days after the entry of that order. *See* Sup. Ct. R. 13.1, 13.3. Nonetheless, out of an abundance of caution, the aforementioned extension of time was sought.

2071(a) (2000); Federal Rule of Appellate Procedure 47(a)(1); and Ninth Circuit Rule 36-3. These authorities, as well as Ninth Circuit Rules 36-1, 36-2, and 36-4 to 36-6, also are reproduced in Appendix D (at Pet. App. 18a-23a).

STATEMENT OF THE CASE

This case presents two questions. The first is whether the "origin of the claim" standard as first articulated by this Court in *United States v. Gilmore*, 372 U.S. 39 (1963), represents the proper standard for determining the activity to which an expense relates (and therefore the deductibility of that expense) for federal income tax purposes.

The second question presented by this case is whether federal courts of appeal can, by local rule, substantially limit the precedential effect of their decisions.

1.a. 26 U.S.C. § 162 (2000) ("Trade or business expenses"), subsection (a), generally provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." Similarly, 26 U.S.C. § 212 (2000) ("Expenses for production of income") provides:

> In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year –
>
> (1) for the production or collection of income;
>
> (2) for the management, conservation, or maintenance of property held for the production of income; or
>
> (3) in connection with the determination, collection, or refund of any tax.

Conversely, 26 U.S.C. § 262 (2000) ("Personal, living, and family expenses"), subsection (a), generally provides: "Except as otherwise expressly provided in this chapter [(§§ 1-1400)], no deduction shall be allowed for personal, living, or family expenses."

In *Gilmore*, this Court held, in connection with these provisions, that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' and hence whether it is deductible." 372 U.S. at 49.[2]

b. Petitioner Odelia Braun was hired as an Associate Physician Diplomate and Assistant Clinical Professor of Medicine at the University of California, San Francisco (UCSF) in 1985. Pet. App. 7a. Dr. Braun's initial duties at UCSF included emergency room patient care and medical student and resident physician training. Pet. App. 7a. Over time, Dr. Braun acquired a particular interest in cardiac arrest emergency response, i.e., that cardiac care typically rendered by paramedics and firefighters. Pet. App. 7a. In 1987, Dr. Braun became the director of the Center for Prehospital Research and Training (CPRT), an organization created by UCSF to enable Dr. Braun to continue her research in this area. Pet. App. 7a-8a.

As Dr. Braun was implementing various public emergency response training programs, she saw a need for the implementation of similar systems within the private sector. Pet. App. 8a. In May 1992, Dr. Braun collaborated with others in preparing a business plan for a private company eventually called Save-a-Life Systems to carry out this concept. Pet. App. 9a.

In November 1993, the California State Auditor initiated a financial audit of the USCF Department of Medicine, including CPRT. Pet. App. 10a. The audit was precipitated by allegations of noncompliance with university policy. Pet. App. 10a. Throughout the audit, Dr. Braun received assurances that her position at UCSF was not in jeopardy, and in June 1994, UCSF extended her contract as

---

[2] Though *Gilmore* involved what is now § 212 (*see* 372 U.S. at 40), the holding of that case (as this and other cases demonstrate) also has been applied in connection with deductions sought pursuant to § 162(a).

director of CPRT through June 1995. Pet. App. 10a. The results of the audit were made public in November 1994. Pet. App. 10a.

Starting in June 1994, Dr. Braun consulted with various attorneys because of concerns she had about leaks of audit-related information to the media and the impact adverse publicity might have on her professional reputation. Pet. App. 11a. Despite these efforts, the *San Francisco Chronicle* and *San Francisco Examiner* newspapers published several articles between July and November 1994 with respect to the audit of CPRT. Pet. App. 11a. As a result of the adverse publicity contained in these articles, a possible source of outside financing for Save-a-Life Systems, as well as Dr. Braun's plans for the incorporation and development of this company, were put on hold. Pet. App. 12a.

c. Dr. Braun and her husband, Petitioner Eric Test, filed a joint 1994 federal income tax return. Pet. App. 12a. On that return, Petitioners deducted the above-referenced legal expenses as an "above-the-line" deduction, i.e., as expenses attributable to their Save-a-Life Systems business. Pet. App. 12a.

Respondent disagreed with Petitioners' characterization of their legal expenses. Pet. App. 12a. Though Respondent agreed that Petitioners' legal expenses constituted ordinary and necessary business expenses, Respondent determined that those expenses were not attributable to Petitioners' Save-a-Life Systems business, but rather were attributable to Dr. Braun's employment at UCSF. Pet. App. 12a. Accordingly, Respondent determined that Petitioners' legal expenses were deductible only as an itemized ("below-the-line") deduction. Pet. App. 12a.[3]

---

[3] Trade or business expenses allowed as deductions under § 162(a) are deductible from gross income in the calculation of a taxpayer's adjusted gross income (i.e., are deductible "above the line") only where the trade or business "does not consist of the performance of services by the taxpayer as an employee." 26 U.S.C. § 62(a)(1) (2000). Where the expenses at issue are attributable to a taxpayer's employment, the expenses are deductible only from adjusted gross income ("below the line") as a

Because of various statutory limits imposed on itemized deductions (*see, e.g.*, 26 U.S.C. § 67 (2000)), Respondent's recharacterization of Petitioners' legal expenses resulted in a tax deficiency of more than $20,000. Pet. App. 6a.

d. Petitioners petitioned Respondent's determination to the United States Tax Court.[4] Following *Gilmore*, the Tax Court held that the "origin" of Petitioners' legal expenses was Dr. Braun's employment at UCSF, and not her Save-a-Life Systems business. Pet. App. 14a. In so holding, the Tax Court opined:

> We do not question whether petitioner was engaged in a Schedule C trade or business. Nor do we doubt that petitioner was indeed concerned that the State audit and consequences flowing from the audit could negatively affect her professional reputation and therefore her Schedule C business. However, we are bound by the rule established by *United States v. Gilmore, supra*, to look to the origin of the underlying claim and not the consequences. Petitioner's motives for hiring attorneys and exploring her legal options simply are not relevant. The origin of the claim herein was not in the trade or business of [Save-a-Life Systems] but rather in petitioner's activities as an employee of UCSF. The event that caused her to hire attorneys, the State audit of CPRT, was directly related to her employment as director of CPRT. The legal expenses were incurred in response to an event that was not part of [Save-a-Life Systems'] business, but, rather, was part of petitioner's employment. Thus, the fact that the legal services may have resulted in damage control necessary to fend off disparaging relationships is

---

miscellaneous itemized deduction in the calculation of taxable income. 26 U.S.C. § 63(a) (2000).

[4] The Tax Court had jurisdiction of this case under 26 U.S.C. §§ 6213(a) and 6214(a) (2000).

> irrelevant because the State audit, which had nothing to do with SLS, was the precipitating event.

Pet. App. 14a-15a. Accordingly, the Tax Court sustained Respondent's determination as to the deductibility of these expenses and the corresponding deficiency. Pet. App. 15a.

e. Petitioners appealed the Tax Court's decision to the United States Court of Appeals for the Ninth Circuit. In an unpublished memorandum decision, the court of appeals affirmed. Pet. App. 3a-5a. Like the Tax Court, the court of appeals concluded that, under *Gilmore*,

> the issue before the Tax Court was not whether Dr. Braun sought legal advice because she was a University of California at San Francisco (UCSF) employee or because she was a concerned Schedule C business owner. Instead, the Tax Court was required to look to the event that prompted Dr. Braun to seek legal services.

Pet. App. 5a. Thus: "While it *may* be true that Dr. Braun would not have contacted attorneys but for her concern for her Schedule C business, the Tax Court was required to look to the origin of the underlying claim, not the consequences." Pet. App. 5a. And because the Tax Court's finding that the origin of Dr. Braun's legal expenses lied in her activities as an employee of UCSF was not clearly erroneous, the court of appeals concluded that those expenses were deductible only as unreimbursed employee business expenses. Pet. App.5a.

2.a. Ninth Circuit Rule 36-1 provides that each written disposition of that court is given one of three designations: "opinion," "memorandum," or "order." Though all "opinions" are "published," "no memoranda are published," and "orders are not published except by order of the court." *Id.* (The stated criteria for determining which dispositions are designated "opinions" are set forth in Ninth Circuit Rule 36-2.) Only "published" dispositions are made available to legal publishing companies to be officially reported and cited. 9th Cir. R. 36-1. Besides prohibiting their

publication, Ninth Circuit Rule 36-1 also prohibits the identification of the authors of "memoranda" and "orders."

Ninth Circuit Rule 36-3 further provides that (except in limited circumstances) "unpublished" dispositions of that court "are not binding precedent" and "may not be cited to th[at] Court or to or by any other court in this circuit." Though the publication of any unpublished disposition "may be requested by a letter addressed to the Clerk" (9th Cir. R. 36-4), such decisions apparently are left to the discretion of the panel that so designated the disposition in the first instance.

b. In accordance with Ninth Circuit Rule 36-4, Petitioners requested that the court of appeals' memorandum disposition in this case be published. In their request, Petitioners argued that Ninth Circuit Rule 36-3 (that court's local rule governing the precedential effect of unpublished decisions) was unconstitutional and exceeded that court's rule-making power. By an order issued by the same three-judge panel that issued the memorandum disposition, the request for publication was denied. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This Court should reexamine *Gilmore* and reconsider the "origin of the claim" standard currently used to determine the activity to which an expense relates under the Internal Revenue Code. *Gilmore* has been widely criticized, for the "origin of the claim" standard espoused in that decision has proved difficult to apply and rests on a faulty legal theory. Because of these problems, the application of the *Gilmore* "origin of the claim" standard has produced uneven results seemingly in conflict with those statutes purportedly being interpreted. Yet, because lower federal courts are bound to apply *Gilmore*, the problems associated with the "origin of the claim" standard – which has been extended to a wide variety of contexts – will continue unless and until this Court steps in. This case represents the

appropriate vehicle for a reexamination of that precedent, in that it demonstrates clearly the problems caused by the *Gilmore* standard and would provide a firm platform for the announcement of a standard that more directly ties expenses to the activities to which they relate.

This Petition also should be granted to consider a question of paramount importance to the federal judiciary: whether federal courts may, by rule, substantially limit the binding precedential effect and citation of their decisions. The federal courts and legal scholars alike are divided as to the constitutionality of such rules, leaving litigants (and sometimes even the courts themselves) in a quandary regarding the precedential effect of a large number of federal court decisions. Perhaps more importantly, unless and until this Court considers this issue, other, larger questions that go to the very nature of the federal judicial power and our understanding of the doctrine of stare decisis will remain unresolved. And even aside from their constitutionality, there is an issue whether local court rules that purport to limit the precedential effect of judicial decisions exceed the rule-making power of those promulgating courts as provided in 28 U.S.C. § 2071 and Federal Rule of Appellate Procedure 47. Because the courts of appeals themselves are the authors of such rules, an exercise of this Court's supervisory power is warranted. Here also, this case represents the appropriate vehicle for such an exercise, in that this case consists of a direct appeal of a denial of a request for publication by the circuit with the most far-reaching "unpublished" decision rules in the federal system.

1. Because of the "continuing importance of the question in the administration of the federal income tax laws" (*Gilmore*, 372 U.S. at 41), the Court should grant this Petition to again take up "what may be the hardest classification problem in the entire tax field" (Marvin A. Chirelstein, *Federal Income Taxation* 97 (8th ed. 1999)) – the determination of the activity to which any given expense properly relates.

It is difficult to overstate the importance of the *Gilmore* "origin of the claim" standard. For not only is it used to distinguish business and investment expenses from personal expenses, it is used (and was used in this case) to distinguish the more typical ("above-the-line") business expenses from those business expenses associated with one's status as an employee (which are only deductible as itemized expenses). The *Gilmore* "origin of the claim" standard also has been used by this Court to distinguish those expenses that are immediately deductible from those that should be capitalized. *See Woodward v. Commissioner*, 397 U.S. 572, 577-78 (1970). *See generally* 1 Boris I. Bittker & Lawrence Lokken, *Federal Taxation of Income, Estates, and Gifts* ¶ 20.5.2, at 20-120 to –121 (3d ed. 1999) (discussing various applications of the *Gilmore* "origin of the claim" standard).

Yet, from its inception, the *Gilmore* "origin of the claim" standard has been criticized. *See, e.g., The Supreme Court, 1962 Term – Leading Cases*, 77 Harv. L. Rev. 152, 153-56 (1963). For one thing, the *Gilmore* standard, though simple in its statement, has proved difficult to apply. *See, e.g.*, Edward J. Schnee & Nancy J. Stara, *The Origin of the Claim Test: A Search for Objectivity*, 13 Akron Tax J. 97, 100 (1997); Douglas P. Krause, Note, *The Deductibility of Legal Expenses*, 82 Colum. L. Rev. 392, 400 (1982). One reason this standard has proved so difficult to apply is because of the problems surrounding the identification of the relevant "claim." Though a standard incorporating such a term might makes sense in a litigation context (as was the case in *Gilmore*, which involved property claims in a divorce proceeding; *see* 372 U.S. at 40), it makes little sense outside of that context, where there is no "claim."

Determining the "origin" of a claim likewise has proven to be a most difficult task. *See, e.g.*, Schnee & Stara, *supra*, at 101. One reason for this difficulty concerns the questionable theoretical basis for this inquiry. As Professor Chirelstein has commented:

> While the outcome in *Gilmore* is generally viewed as satisfactory, the argument from cause-and-

> effect is, as usual, slightly circular. To be sure, there would have been no litigation without the divorce; but without the property ownership the taxpayer's legal fees would have been appreciably smaller. Just why the divorce rather than the property interest must logically be viewed as the "source" of the added legal expense is not completely obvious.

Chirelstein, *supra*, at 104. Similarly, in *Lykes v. United States*, 343 U.S. 118 (1952) – the precursor to *Gilmore* – Justice Jackson (joined by Justice Frankfurter) argued in dissent:

> I am unable to understand why this payment was not deductible . . . . Certainly contest against unwarranted exaction, regardless of its amount or outcome, is for the conservation of property and its reasonable cost is deductible.
>
> A majority of my brethren seem to think they can escape this conclusion by going further back in the chain of causation. They say the cause of this legal expense was the gift. Of course one can reason, as my brethren do, that if there had been no gifts there would have been no tax, if there had been no tax there would have been no deficiency, if there were no deficiency there would have been no contest, if there were no contest there would have been no expense. And so the gifts caused the expense. The fallacy of such logic is that it would be just as possible to employ it to prove that the lawyer's fees were caused by having children. If there had been no children there would have been no gift, and if no gift no tax, and if no tax no deficiency, and if no deficiency no contest, and if no contest no expense. Hence, the lawyer's fee was not due to the contest at all but was a part of the cost of having babies. If this reasoning were presented by a taxpayer to avoid a tax, what would we say of it? So treacherous is this kind of reasoning that in most fields the law rests its conclusion only on proximate cause and declines to

> follow the winding trail of remote and multiple causations.

Id. at 127-28 (Jackson, J., dissenting). *See also* Brian E. Comerfort & Mason J. Sacks, *Federal Tax Deductions* 714 (1983) (discussing generally the theoretical problems with the *Gilmore* standard); Krause, *supra*, at 398-400 (discussing same); Timothy A. Rodgers, Note, *The Transaction Approach to the Origin of the Claim Doctrine: A Proposed Cure for Chronic Inconsistency*, 55 Brook. L. Rev. 905, 932-33 (1989) (discussing same). And as difficult as determining the "origin" of a claim is in a litigation context, one can only imagine how much more difficult the exercise becomes where (as here) there is no "claim."

Because of these problems, the application of the *Gilmore* standard frequently has led to uneven results. In this case, for example, the court of appeals presumed that Petitioners would not have incurred the legal expenses at issue but for their concern for their business, and yet it upheld the denial of a business deduction therefor. Moreover, "several [lower courts] have questioned the appropriateness of looking to the origins of a [claim] in order to characterize the expenses incurred in connection with it." Krause, *supra*, at 392 (citing *Kopp's Co. v. United States*, 636 F.2d 59 (4th Cir. 1980), and *Dolese v. United States*, 605 F.2d 1146 (10th Cir. 1979)). *See also* Rodgers, *supra*, at 907 & n.14 (discussing the "chronic inconsistency in the application of the origin of the claim doctrine" and citing the numerous cases in which certiorari has been sought as to this standard).

This Petition should be granted so that this Court may fashion a standard for associating expenses with activities that focuses on the reasons why such expenses were incurred, rather than on the origin and character of the claim that gave rise to those expenses. Besides being easier to apply, such a standard would lead to more coherent results. A standard based more on the reasons why any given expense was incurred also would be more in line with other, analogous precedents of this Court. *See, e.g., United*

States v. Generes, 405 U.S. 93, 103 (1972) (holding that the characterization of a bad debt as business or personal is to be determined based on the dominant motivation of the taxpayer in creating or acquiring the debt). *See also Kornhauser v. United States*, 276 U.S. 145, 153 (1928) ("[W]here a suit or action against a taxpayer is directly connected with, or . . . proximately resulted from, his business, the expense incurred is a business expense . . . ."). The time has come for this Court to reconsider this important aspect of federal income tax law. Again, for the reasons stated previously, this case represents the appropriate vehicle for this endeavor.

2. The Court also should grant this Petition in order to consider the propriety of Ninth Circuit Rule 36-3 and its impact on the precedential effect of "unpublished" decisions.

"Rules limiting the precedential effect of unpublished decisions exist in every federal circuit . . . ." *Hart v. Massanari*, 266 F.3d 1155, 1163 n.7 (9th Cir. 2001) (Kozinski, J.).[5] Though the precise wording of such rules varies, many share at least two characteristics. First, almost all empower those courts to limit the precedential effect of "unpublished" decisions directly; Ninth Circuit Rule 36-3, for example, flatly states that such decisions "are not binding precedent."[6] Second, several (including Ninth Circuit Rule 36-3) also limit the precedential effect of "unpublished" decisions indirectly

---

[5] Apparently following the court of appeals' lead, such rules also now exist in all but a handful of states. *See id.*

[6] Ninth Circuit Rule 36-3(a) does create a narrow exception "when relevant under the doctrine of law of the case, res judicata, and collateral estoppel." Many of the circuits have adopted similar rules. *See* 2d Cir. R. 0.23; 3d Cir. I.O.P. 5.3; 5th Cir. R. 47.5.4; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. App., Plan for Publication of Orders, ¶ 3; 10th Cir. R. 36.3(A); 11th Cir. R. 36-2; Fed. Cir. R. 47.6. *See also* D.C. Cir. R. 36(c)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."); 6th Cir. R. 206(c) (providing that "reported panel opinions are binding on subsequent panels," implying that "unreported" opinions are not binding). Only the First and Fourth Circuits have declined to limit directly the precedential effect of "unpublished" decisions.

by generally prohibiting citation thereto.[7] Taken together, these two aspects of Ninth Circuit Rule 36-3 (and similar rules) nullify completely the general precedential effect of those decisions designated by those promulgating courts as "unpublished."

Because the number of "unpublished" decisions issued by federal appellate courts pursuant to these rules is considerable, the effect of rules limiting the precedential effect of those decisions is as well. In fact, approximately 80% of the decisions currently being issued by the various courts of appeals are "unpublished." *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts 2001* Table S-3 (2002), *available at* http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf. Cumulatively, this represents tens of thousands of decisions each year. *See id.*

Historically, rules such as Ninth Circuit Rule 36-3 caused little practical difficulty. "Unpublished" decisions

---

[7] With respect to this limitation also, Ninth Circuit Rule 36-3 provides for certain, narrow exceptions. Again, several circuits have adopted similar rules. *See* 1st Cir. R. 36(b)(2)(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); Fed. Cir. R. 47.6(b). Though the Court of Appeals for the District of Columbia Circuit does not prohibit the citation of "unpublished" decisions of that court (at least with respect to decisions entered on or after January 1, 2002), it generally prohibits the citation of "unpublished" decisions from other courts if citation thereto is prohibited by the issuing court. D.C. Cir. R. 28(c). Similarly, though the Court of Appeals for the Third Circuit does not prohibit the citation of unpublished decisions, that court generally will not cite to such decisions on the ground that they are not (by rule) precedential. 3d Cir. IOP 5.8. Several circuits have rules that disfavor the citation to unpublished decisions, but permit citation thereto if the decision has precedential value in relation to a material issue in the case and there is no published decision that would serve as well. *See* 4th Cir. R. 36(c); 6th Cir. R. 28(g); 10th Cir. R. 36.3(B); 11th Cir. R. 36-2. Finally, though the Fifth Circuit neither prohibits nor expressly disfavors the citation of "unpublished" decisions, Circuit Rule 47.5.4 now requires that a copy of any "unpublished" decision cited be attached to the referring document and that the copy bear the following legend: "Pursuant to Loc.R. 47.5, the court has determined that the opinion should not be published and is not precedential except under the limited circumstances set forth in Loc.R. 47.5.4."

were not readily accessible; as a result, they remained essentially unknown to all but the parties to those decisions. But all of this changed with the advent of computers. Today, federal appellate court decisions, including those not "officially" published in the *Federal Reporter*, are widely available online (through commercial services such as WESTLAW and LEXIS and (in some instances) even from the issuing courts themselves). One legal publisher recently took this interest in "unpublished" decisions one step further and started publishing such opinions in book form (under the name *Federal Appendix*).[8] To complement these resources, there also now exist a number of computerized databases that make it as easy to locate relevant, "unpublished" decisions as it is to locate similar, "published" decisions. (Indeed, as one court of appeals recently observed, these various advances have rendered references to decisions subject to rules such as Ninth Circuit Rule 36-3 as "unpublished" something of a misnomer. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir.), *cert. denied*, 123 S. Ct. 113 (2002).)

Because "unpublished" decisions – which comprise the vast majority of all decisions issued by the court of appeals – have become so widely accessible, the time has come for this Court to consider the propriety of local court rules that purport to limit the precedential effect of such decisions. The propriety of this practice is a matter of compelling importance to the federal judiciary, both as a matter of federal constitutional law and in terms of the rule-making power of the federal courts.[9]

---

[8] For a more detailed description of the history and scope of the *Federal Appendix*, see Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix*: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1, 2-3 (2002).

[9] It is important to note what this second question presented is not about. Petitioners do not question the ability of federal courts to limit the number of decisions that are published in particular publications, such as the *Federal Reporter*. Petitioners also do not question the restrictions

a. Without a doubt, the establishment of precedent is an integral component of our common law judicial tradition. As summarized by one legal scholar:

> A judicial decision has two functions in a common law system. The first, which is not, to be sure, peculiar to the common law, is to define and to dispose of the controversy before the court . . . .
>
> Whether the court discovers or creates the law that it applies, its resolution of the controversy has an impact that extends beyond the parties before it. This is because the second function of a judicial decision, and one that is characteristic of the common law, is that it establishes a precedent so that a like case arising in the future will probably be decided the same way. This doctrine is often called by its Latin name, *stare decisis* . . . .

E. Allen Farnsworth, *An Introduction to the Legal System of the United States* 50-51 (3d ed. 1996). *See also Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."). Notwithstanding this tradition, Ninth Circuit Rule 36-3 purports to limit the precedential effect of federal appellate court decisions. The first issue raised by Question Two of this Petition is whether such rules are constitutional – and in particular, whether they are consistent with Article III and the nature of the judicial power. This Petition should be

---

imposed by some circuits regarding the release of "unpublished" decisions. Finally, Petitioners do not question the manner in which unpublished decisions are written (or even whether they need be written at all). Petitioners question only the ability of federal courts to limit the precedential effect of certain of their decisions, as well as any related prohibitions regarding the citation of such decisions by subsequent litigants and/or courts.

granted so that the Court may resolve this important issue of federal constitutional law.

The federal judiciary is divided as to the constitutionality of circuit court rules governing the precedential effect and citation of "unpublished" decisions. The seminal case in this area is *Anastasoff v. United States*, 223 F.3d 898 (Arnold, J.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).[10] In *Anastasoff*, the Court of Appeals for the Eighth Circuit held that an Eighth Circuit rule providing that "unpublished" decisions generally have no precedential value was unconstitutional as violative of Article III. *Id.* at 899. At least one other federal court has agreed. *See Suboh v. City of Revere*, 141 F. Supp. 2d 124, 143 n.18 (D. Mass. 2001) (Young, C.J.), *aff'd in part and rev'd in part on other grounds sub nom. Suboh v. District Attorney's Office*, 298 F.3d 81 (1st Cir. 2002). *See also Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260 (5th Cir.) (Smith, J., joined by Jones and DeMoss, JJ., dissenting from denial of rehearing en banc, "which would have given this court an opportunity to examine the question of unpublished opinions"), *cert. denied*, 122 S. Ct. 618 (2001); *Re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 36-38 (10th Cir. 1992) (Holloway, C.J., joined by Barrett and Baldock, JJ. concurring and dissenting) (dissenting from the adoption of the Tenth Circuit's former unpublished decision rule).[11]

On the other hand, the Court of Appeals for the Ninth Circuit – despite acknowledging that the "principle of precedent was well established in the common law courts by the time Article III of the Constitution was written" (*Hart*, 266 F.3d at 1174) – has held that rules limiting the

---

[10] Though the panel's decision in *Anastasoff* was vacated as moot by the Court of Appeals for the Eighth Circuit sitting en banc, thus (ironically enough) negating any binding precedential effect, that decision "continues to have persuasive force." *Hart*, 266 F.3d at 1159.

[11] Several legal scholars also have considered this question and likewise have found such rules constitutionally wanting. *See, e.g.*, Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. Rev. 81 (2000).

precedential effect of "unpublished" decisions are constitutional (*id.* at 1180). Following *Hart*, the Federal Circuit has reached the same conclusion. *See Symbol Technologies*, 277 F.3d at 1366-68.[12]

Unless and until this Court resolves this issue, the parameters of the court of appeals' authority in this regard will remain unclear. For example, if such courts are permitted to limit the precedential effect of "unpublished" decisions, are they similarly permitted to limit the precedential effect of "published" decisions? Alternatively, are they permitted to designate all of their decisions as "unpublished"? In other words, may federal courts, by rule, do away with the doctrine of stare decisis entirely, thereby permitting them to rule on an essentially ad hoc basis, unfettered by what had been decided before? So long as the constitutionality of such rules remains uncertain, questions such as these will remain unresolved.

Doubts as to the constitutionality of such rules also could have enormous implications vis-à-vis the doctrine of stare decisis and the nature of the judicial power that go well beyond the questions raised in this case. For example, if rules permitting federal courts to limit the precedential effect of their decisions are constitutional, does this then mean that the doctrine of stare decisis is not of constitutional dimension? *See, e.g., Hart*, 266 F.3d at 1175 ("For the reasons explained, the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy."); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535, 1548 (2000) (arguing that stare decisis "is a policy judgment, *not* a rule of law specified in the Constitution or clearly implicit in its provisions or overall

---

12. This contrary view similarly is not without its academic supporters. *See, e.g.*, Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 Notre Dame L. Rev. 135 (2001).

structure"). *But see, e.g.*, Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 577 (2001) ("Article III's grant of 'the judicial power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication."). And if the doctrine of stare decisis is not constitutionally-based, by what authority may federal courts (including this Court) resist current understandings of constitutional (or even statutory) provisions when deciding cases of that nature? Does the doctrine then retain any ability to bind this Court (or even any lower federal court) in this context? *See, e.g.*, Paulsen, *supra*, at 1548 n.38:

> [T]o the extent judges rely on the doctrine to follow precedents *rather than* (and contrary to) the Constitution, the doctrine of stare decisis is *unconstitutional*: The Constitution is paramount law, and must take precedence (no pun intended) over precedents that depart from it, under the reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which declared that courts must prefer the Constitution to the act of a subordinate agency under the Constitution, when the two conflict.

Accord Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994). *But see, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) (refusing to overrule *Roe v. Wade*, 410 U.S. 113 (1973), pursuant to this doctrine).[13]

---

[13] Some have further argued that rules prohibiting the citation of unpublished decisions are unconstitutional as violative of the First Amendment. *See, e.g.*, Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 297-315 (2001). Some also have argued that denying precedential value to unpublished decisions violates the Fifth Amendment. *See, e.g.*, Jon A. Strongman, Comment, *Unpublished Opinion, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional*, 50 U. Kan. L. Rev. 195, 211-22 (2001); Lance A. Wade, Note, Honda *Meets* Anastasoff*: The Procedural Due Process Argument*

b. This Court also should consider whether rules such as Ninth Circuit Rule 36-3 exceed the those promulgating courts' rule-making authority.

28 U.S.C. § 2072 (2000) empowers this Court to prescribe "general rules of practice and procedure . . . for cases in the United States . . . courts of appeals" (subsection (a)), so long as such rules do not "abridge, enlarge or modify any substantive right" (subsection (b)). Pursuant to that authority, this Court promulgated Federal Rule of Appellate Procedure 47 ("Local Rules by Courts of Appeals"). Rule 47(a)(1) empowers each individual circuit court of appeals to "make and amend rules governing its practice," (again) so long as such local rules are "consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072."[14] Similarly, 28 U.S.C. § 2071(a) provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title." Ninth Circuit Rule 36-3 (and like rules) presumedly were promulgated pursuant to these authorities.

The issue whether local rules that limit the precedential effect of those court's decisions are consistent with these authorities thus turns primarily on whether such rules relate to those courts' practice and the conduct of their business and do not abridge, enlarge or modify any substantive right – in other words, "whether the subject matter governed by the rule is . . . within the power of a

---

Against Rules Prohibiting Citation to Unpublished Judicial Decisions, 42 B.C. L. Rev. 695, 722-31 (2001). Finally, some have argued that such rules violate constitutional separation of powers principles. *See, e.g.*, Jennifer Adams, Comment, *Law Today; Gone Tomorrow*, 53 Baylor L. Rev. 659, 679-80 (2001). Granting this Petition as to this question would permit the Court to consider these arguments as well.

[14] Presumedly, such "Acts of Congress" would include § 2072 (and its prohibition regarding the abridgment, enlargement, and modification of substantive rights) itself.

lower federal court to regulate." *Frazier v. Heebe*, 482 U.S. 641, 654 (1987) (Rehnquist, C.J., dissenting). And under the standard set forth by this Court in *Hanna v. Plumer*, 380 U.S. 460 (1965), there is a substantial issue whether rules that purport to limit the precedential effect of a federal court's decisions are consistent with 28 U.S.C. §§ 2071, 2072 and Federal Rule of Appellate Procedure 47. *Cf. Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) ("[I]t would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act . . . .").

Independent of a *Hanna*-type analysis, this Court also has held that it "may exercise its inherent supervisory power to ensure that these local rules are consistent with the principles of right and justice" and "to protect the integrity of the federal system." *Frazier*, 482 U.S. at 645, 648 n.7 (internal quotation marks omitted).[15] Pursuant to this authority, there are a number of aspects of rules such as Ninth Circuit Rule 36-3 that the Court might consider, including:

i. the justification for a set of rules that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in that court's own "unpublished" decisions;

ii. the criteria used to determine if a decision is worthy of binding precedential value (or even whether there need be any such standard); and

iii. whether the satellite litigation that has been spawned as a result of rules of this nature is worth the cost.

See also County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal) ("Th[e]

---

[15] *But see id.* at 652 (Rehnquist, C.J., joined by O'Connor and Scalia, JJ., dissenting) (denying the existence of any such supervisory power). If for no other reason, this Petition should be granted so that the Court may consider the continuing vitality of *Frazier*.

decision not to publish the [Court of Appeals for the Ninth Circuit's] opinion or permit it to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong.").

In sum, because of the overriding importance of this Question Two, and because issues concerning the propriety of rules limiting the precedential effect of "unpublished" decisions call for the exercise of this Court's supervisory power, immediate review by this Court is warranted.[16] This case, which involves a direct challenge to the Ninth Circuit's rules governing "unpublished" decisions, represents the appropriate vehicle.

---

[16] As the Court might be aware, the Advisory Committee on Appellate Rules recently began considering a proposed amendment to the Federal Rules of Appellate Procedure (styled as Rule 32.1) that would address the matter of the citation of court of appeals decisions designated as non-binding precedent. *See* Draft Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules, November 18, 2002, San Francisco, California 22-39 (copy available from the Rules Committee Support Office of the Administrative Office of the United States Courts). But the version of this proposed rule tentatively settled upon (*see id.* at 39) "is extremely limited," in that it "takes no position on whether designating opinions as non-precedential is constitutional"; "does not . . . forbid any court from [issuing non-precedential decisions]"; "does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision"; and "says nothing about what effect a court must give to one of its non-precedential opinions." *Id.* at 28-29. Rather: "The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential." *Id.* at 29. Moreover, as the Court is aware, a rule such as proposed Rule 32.1, being still in an embryonic state (and in fact, the precise language of this proposed rule has yet to be settled upon; *see id.* at 39), is years away from promulgation in final form. Accordingly, the resolution of Question Two as raised in this Petition should not delayed pending the outcome of that rule-making process.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRADLEY SCOTT SHANNON
Counsel of Record
UNIVERSITY OF IDAHO
COLLEGE OF LAW
Sixth and Rayburn Streets
P. O. Box 442322
Moscow, ID 83844-2322
(208) 885-6541

JANUARY 2003

APPENDIX A
ORDER OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT
DATED NOVEMBER 12, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71283
Tax Court No. 4907-99

ERIC TEST; ODELIA BRAUN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

[Filed November 12, 2002]

ORDER

Before: KOZINSKI and KLEINFELD, Circuit Judges, and BEISTLINE,* District Judge.

The request for publication is denied. 9th Cir. R. 36-4. Counsel's request relies on Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), but we have already rejected that decision. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). Counsel for appellants inexcusably failed to note controlling authority squarely on point.

---

* The Honorable Ralph R. Beistline, United States District Judge for the District of Alaska, sitting by designation.

APPENDIX B

MEMORANDUM OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

DATED OCTOBER 1, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71283
Tax Court No. 4907-99

ERIC TEST; ODELIA BRAUN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

[Filed October 1, 2002]

MEMORANDUM*

Appeal from the United States Tax Court
Joel Gerber, Tax Court Judge, Presiding

Argued and Submitted September 12, 2002
San Francisco, California

Before: KOZINSKI and KLEINFELD, Circuit Judges, and BEISTLINE,** District Judge.

Eric Test and Dr. Odelia Braun (hereinafter Dr. Braun) appeal the Tax Court's decision finding a $24,647 deficiency in their 1994 federal income tax. The Tax Court determined that certain legal fees incurred by Dr. Braun were deductible only as unreimbursed employee business expenses; i.e., below-the-line deductions. We affirm.

"The deductibility of legal fees depends on the origin and character of the claim for which the expenses were incurred and whether the claim bears a sufficient nexus to the taxpayer's business or income-producing activities." Test v. Comm'r, T.C.M. (RIA) 2000-362 (2001) (citing United States v. Gilmore, 372 U.S. 39 (1963)) (emphasis added). Indeed, "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' and hence whether it is deductible or not [as an above-the-line business expense]." Gilmore, 372 U.S. at 49 (emphasis added). The relevant "claim," for purposes of applying the "origin of the claim" standard, is the underlying event that gave rise to the legal expenses. Keller St. Dev. Co. v. Comm'r, 688 F.2d 675, 680 (9th Cir. 1982).

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ralph R. Beistline, United States District Judge for the District of Alaska, sitting by designation.

Thus, the issue before the Tax Court was not whether Dr. Braun sought legal advice because she was a University of California at San Francisco (UCSF) employee or because she was a concerned Schedule C business owner. Instead, the Tax Court was required to look to the event that prompted Dr. Braun to seek legal services. Gilmore, 372 U.S. at 49. If the origin of those legal services was rooted in Dr. Braun's Schedule C business, she could have deducted the legal services on her Schedule C. The Tax Court concluded that it was not. We review this factual finding for clear error. Keller St. Dev. Co., 688 F.2d at 678.

While it may be true that Dr. Braun would not have contacted attorneys but for her concern for her Schedule C business, the Tax Court was required to look to the origin of the underlying claim, not the consequences. Gilmore, 372 U.S. at 47-49. It did exactly that.

The Tax Court found that, "[t]he origin of the claim herein was not in the [Schedule C] trade or business . . . but rather in [Dr. Braun's] activities as an employee of UCSF." Test v. Comm'r, T.C.M. (RIA) 2000-362 (2001) (emphasis added). This finding was not clearly erroneous in light of the evidence in the record. Therefore, the Tax Court was correct in concluding that Dr. Braun's legal fees were deductible as unreimbursed employee business expenses; i.e., below-the-line deductions.

AFFIRMED.

APPENDIX C
OPINION OF THE UNITED STATES TAX COURT
DATED NOVEMBER 27, 2000

UNITED STATES TAX COURT

Docket No. 4907-99

ERIC TEST AND ODELIA BRAUN, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Filed November 27, 2000

Karen L. Hawkins, for petitioners.

G. Michelle Ferreira, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GERBER, Judge: Respondent determined a $24,647 deficiency in petitioners' 1994 Federal income tax and a $4,929 accuracy-related penalty pursuant to section 6662(a).[1] The issues for our consideration are: (1) Whether legal fees incurred by petitioners are deductible as Schedule C business expenses or as Schedule A miscellaneous itemized deductions, and (2) whether petitioners are liable for the accuracy-related penalty under section 6662(a).

---

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT[2]

Petitioners resided in Redwood City, California, at the time they filed their petition. Petitioners filed a joint Federal income tax return for the 1994 tax year. Odelia Braun (petitioner) is a medical doctor, who in 1985 was hired as an Associate Physician Diplomate and Assistant Clinical Professor of Medicine at the University of California, San Francisco (UCSF). When petitioner began working at UCSF, she was responsible for patient care in the emergency room and for training residents and medical students. Petitioner acquired an interest in the aspect of emergency medicine that was provided before the patient arrived at the hospital; i.e., the care that was rendered by paramedics and firefighters.

From 1985 through 1987, petitioner undertook a study of cardiac arrest emergency response systems in San Francisco, California, and around the United States. Petitioner, with the assistance of paramedics and firefighters, collected medical data on all patients who suffered cardiac arrest in San Francisco and learned that only 4 percent survived. Petitioner traveled around the country and visited other emergency medical services (EMS) to determine whether improvements in the San Francisco EMS systems could be made. After undertaking these studies, petitioner put together a proposal for the City of San Francisco to revamp the EMS system. One specific part of the proposal focused on the need to get defibrillators to the people suffering from cardiac arrest sooner, for example by putting defibrillators on firetrucks.

After petitioner's plan was approved by the board of supervisors, the department of public health, and the San Francisco Fire Department, petitioner approached her supervisors at UCSF. The university created the Center for Prehospital Research and Training (CPRT) as a structure for petitioner to work in and continue her research. In 1987,

---

[2] The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

petitioner became the director of CPRT. CPRT taught emergency preparedness and cardiac pulmonary resuscitation (CPR) to the public and studied prehospital cardiac arrest treatment. Petitioner's main role as director of CPRT centered on research.

During her years as director of CPRT, petitioner successfully wrote research grant proposals and contract proposals for training firefighters in medical procedures, training emergency medical technicians and paramedics for ambulances, training school teachers in CPR, training school children in emergency recognition and response, and for training the general public in CPR. By 1993, petitioner had received local, statewide, and national acclaim and letters of support for her efforts to improve public awareness of the need to learn and perform CPR at the earliest possible indication of a heart attack. Prominent members of the medical and political communities supported her efforts to expand her public sector training concepts.

Petitioner's Business Venture--Save-a-Life Systems

As petitioner was implementing emergency medical response training programs within public entities, she formulated the idea that private sector emergency response systems were needed to coordinate with the public systems in order to insure that cardiac emergencies which occurred in private facilities received the proper recognition and the proper medical response until the public emergency response system arrived on the scene. As a result, petitioner decided that there was a need to teach people in public and private facilities how to recognize an emergency in progress, where to find emergency equipment placed within the building, how to place a call to the public emergency response system using "911", and how to administer CPR and/or use a defibrillator until the arrival of the public emergency response team.

In an effort to prove that expansion of the emergency medical response training into the private sector was worthwhile, petitioner worked with the San Francisco Giants

organization to create the first prototype for a private facility emergency response system. The ushers at Candlestick Park were trained to recognize emergencies and to communicate the occurrence of an emergency to the paramedics and emergency response teams located throughout the stadium. Automatic defibrillators were also placed in the stadium for use by the trained staff during cardiac emergencies. Petitioner's work with the San Francisco Giants' emergency response program was done in her individual, private capacity and not as the director of CPRT.

In May 1992, petitioner collaborated with others in preparing a business plan for a private company called "WorkSafe America Corp." The business plan expanded on petitioner's concept to bring EMS systems into the private sector by encouraging private industry to purchase defibrillation equipment and place it in strategic locations where statistics showed the public was more apt to need and benefit from access to such equipment. The strategy was to create a consortium of vendors (of defibrillators), large employers, and an implementation/training team headed by petitioner which would place equipment and trained personnel in locations where heart seizures were most likely to occur--in private work and recreational facilities.

In June 1992, petitioner met with Attorney Lawrence Eisenberg for advice regarding how to set up a business. They discussed the steps needed to introduce petitioner's WorkSafe America Corp. concepts of providing emergency medical care training and defibrillator training to the private sector. The name to be utilized for petitioner's concept was revised when petitioner applied to the Department of Corporations in California and learned that the name WorkSafe America Corp. was already being used by another organization. The new name selected by petitioner was "Save-a-Life Systems" (SLS), but the concepts and goals for petitioner's private business did not change.

In November 1993, a new business plan for SLS was developed and petitioner met with different defibrillation companies. Negotiations went the farthest with Physio-Control, a defibrillator manufacturer located in Redmond, Washington. During the first quarter of 1994, petitioner, Mitchell Rappaport, and Doron Braun traveled to Washington to meet with Physio-Control and present their plan to the multiple areas within the organization. The purpose of the meeting was to share petitioner's concepts and seek a partnership with Physio-Control which would result in funding for SLS. The meeting with Physio-Control was very positive, and petitioner believed that Physio-Control was prepared to partner with SLS and provide funding for her private business venture.

The State Audit of CPRT

In November 1993 the State of California Office of the State Auditor initiated an audit of UCSF which was directed at the department of medicine and included CPRT. The State audit was precipitated by allegations of noncompliance with university policy leveled against the department of medicine.

Harry Cordon, director of audit and management services at UCSF, was responsible for all interaction with the office of State Auditor during its conduct of the audit. UCSF was concerned about certain procedures being employed during the State audit and retained Coopers & Lybrand to perform a shadow audit. During both the State audit and the Coopers & Lybrand audit, petitioner made herself available and expended a great deal of time and effort providing information requested by the auditors. At no time during the audits did Harry Cordon believe petitioner's position at UCSF was in jeopardy or that she should be concerned about her employment with UCSF. In fact, petitioner received continued assurances during the audits that her position was secure with the CPRT, and in June 1994, USCF extended petitioner's contract as director of CPRT through June 1995. The State's audit report was made public in November 1994.

Between July and November 1994, the San Francisco Chronicle and the San Francisco Examiner newspapers published several articles referencing CPRT and the State audit. As a result of these articles, petitioner was concerned that adverse publicity would impact her ongoing efforts to obtain funding for SLS. In June 1994, petitioner consulted with two attorneys, Charlotte Fishman and Laura Stevens, because of concerns she had about leaks of information to the media regarding the State audit and the potential impact of adverse publicity to her professional reputation.

On June 30, 1994, petitioner retained the law firm of Rogers, Joseph, O'Donnell & Quinn (RJO&Q). Petitioner consulted with her lawyers at RJO&Q many times in 1994. On the advice and recommendation of RJO&Q, petitioner also retained the law firm of Topel & Goodman.

According to RJO&Q's billing reports, the following legal services were performed for petitioner during June, July, August, and September 1994: (1) Research, preparation, and drafting of documents for the criminal prosecution of petitioner and CPRT; (2) preparation of a lawsuit to prevent the release of the draft State audit report; (3) research, preparation, and meetings with respect to the State audit investigation of CPRT; (4) review of documents in petitioner's personnel file regarding sex discrimination; (5) research, preparation, meetings, and drafting correspondence with respect to the Coopers & Lybrand audit of CPRT; (6) responding and communicating with the media; and (7) communication with petitioner's criminal defense attorney, William Goodman. All of the billing statements sent to petitioner from RJO&Q for services performed in June, July, August, and September of 1994 were, according to their heading, regarding the "State audit of CPRT and Dr. Braun".

Between July and November 1994, petitioner and her lawyer consulted with a public relations firm regarding media response strategy and the preparation of press

releases on behalf of petitioner. As a result of the adverse publicity being printed in the San Francisco news media, petitioner put the incorporation and development of SLS on hold. Around this time, Physio-Control also put its plans to fund SLS on hold.

Petitioners' Tax Return

Petitioners' 1994 Federal income tax return was prepared by Ronald Stern, a certified public accountant (C.P.A.). Mr. Stern had prepared petitioners' income tax returns for 15 years. Before preparing petitioner's Schedule C for the 1994 tax year, Mr. Stern discussed with petitioner the purpose of the legal and professional services proposed to be deducted.

For the 1994 tax year, petitioners deducted $87,300 on Schedule C for legal and professional fees. Respondent determined that petitioner's legal fees, in the amount of $70,611, are deductible as a Schedule A miscellaneous itemized deduction as opposed to a Schedule C deduction.[3] Respondent also determined that petitioner is entitled to an additional depreciation deduction on her Schedule C in the amount of $3,180.

OPINION

The issues for our consideration are: (1) Whether legal fees in the substantiated amount of $70,611 are deductible on petitioner's Schedule C as ordinary and necessary business expenses or whether they are deductible on petitioners' Schedule A as unreimbursed employee business expenses subject to the 2 percent of adjusted gross income floor and the alternative minimum

---

[3] While petitioners deducted $87,300 in legal and professional fees on Schedule C, Profit or Loss From Business, of their Form 1040, U.S. Individual Income Tax Return, in 1994, they have conceded that only $70,611 has been substantiated. Of the $70,611 in substantiated expenses, $6,198.64 were expended by petitioner for services in connection with petitioner's Save-a-Life systems (SLS) business.

tax, and (2) whether petitioners are liable for an accuracy-related penalty under section 6662(a).

Legal Expenses

Section 162(a) allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". Ordinary and necessary legal expenses are generally deductible under section 162(a) when the matter giving rise to the expenses arises from, or is proximately related to, a business activity. See Kornhauser v. United States, 276 U.S. 145, 153 (1928).

In order to be deductible on Schedule C, an expense must be directly connected with, or proximately result from, a trade or business of the taxpayer. See id.; O'Malley v. Commissioner, 91 T.C. 352, 361 (1988), affd. 972 F.2d 150 (7th Cir. 1992). If a taxpayer's trade or business is that of being an employee, however, then the legal expenses will be treated as an itemized deduction, subject to the limitation of section 67. See McKay v. Commissioner, 102 T.C. 465 (1994), revd. on other grounds 84 F.3d 433 (5th Cir. 1996); Alexander v. Commissioner, T.C. Memo. 1995-51.

The deductibility of legal fees depends on the origin and character of the claim for which the expenses were incurred and whether the claim bears a sufficient nexus to the taxpayer's business or income-producing activities. See United States v. Gilmore, 372 U.S. 39 (1963). The Supreme Court stated that "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test". Id. at 49. Thus, in order for petitioner's legal fees to be deductible on her Schedule C, the origin of those legal services must have been rooted in SLS, her Schedule C business.

Petitioners maintain that the legal fees are correctly claimed on Schedule C because the expenses are directly

related to petitioner's professional reputation, and thus SLS. Respondent argues that the origin of petitioner's legal fees did not arise from her Schedule C trade or business, and that under United States v. Gilmore, supra, the consequences to petitioner's Schedule C business are irrelevant to the analysis.

Based upon the record, the origin of petitioner's legal fees stems from her status as an employee of UCSF, and not from her Schedule C trade or business. The event that prompted petitioner to hire attorneys in 1994 was the State audit of CPRT and the impending release of the audit report. While the record is replete with testimony from petitioner regarding the reasons she retained legal counsel, it is also replete with evidence that the event that prompted the legal services was the State audit. The billing detail from petitioner's attorneys indicates that the majority of their services concerned the impending release of the State's audit report and centered around the State audit of CPRT. The billing detail further indicates that the legal services performed were directly related to her employment with UCSF as director of CPRT. Indeed, the entire record indicates that petitioner hired attorneys in response to the State audit of CPRT.

We do not question whether petitioner was engaged in a Schedule C trade or business. Nor do we doubt that petitioner was indeed concerned that the State audit and consequences flowing from the audit could negatively affect her professional reputation and therefore her Schedule C business. However, we are bound by the rule established by United States v. Gilmore, supra, to look to the origin of the underlying claim and not the consequences. Petitioner's motives for hiring attorneys and exploring her legal options simply are not relevant. The origin of the claim herein was not in the trade or business of SLS but rather in petitioner's activities as an employee of UCSF. The event that caused her to hire attorneys, the State audit of CPRT, was directly related to

her employment as director of CPRT. The legal expenses were incurred in response to an event that was not part of SLS' business, but, rather, was part of petitioner's employment. Thus, the fact that the legal services may have resulted in damage control necessary to fend off disparaging publicity and salvage petitioner's Schedule C business relationships is irrelevant because the State audit, which had nothing-to do with SLS, was the precipitating event.

Petitioners contend that the legal fees were not incurred in connection with any litigation, but instead they were incurred to seek advice and counsel. Thus, they argue, it is appropriate to examine the nature of the taxpayer's concerns and the reason the advice is sought. Petitioners cite Ahadpour v. Commissioner, T.C. Memo. 2000-68, for the proposition that costs associated with legal advice obtained while trying to protect one's business reputation are deductible. Petitioners' reliance on Ahadpour, however, is inapposite because in that case we (1) did not consider whether the taxpayer was protecting his professional reputation, (2) concluded that the taxpayer was not entitled to a deduction for legal fees, and (3) did not suggest that a separate test for determining deductibility applies when dealing with fees for legal advice as opposed to fees for litigation. Indeed, in Ahadpour v. Commissioner, supra, we utilized the "origin of claim" test set forth in United States v. Gilmore, supra.

Accordingly, we find that the claim or event that prompted petitioner to incur legal fees did not arise in connection with petitioner's Schedule C trade or business, and therefore we sustain respondent's determination that the legal fees in the amount of $64,412.36 are deductible as unreimbursed employee business expenses on Schedule A.

With respect to the $6,198.64 expended by petitioner for services in connection with petitioner's SLS business, petitioners are entitled to claim that amount as a business expense on the Schedule C for the 1994 taxable

year. Accordingly, to that extent, petitioners have shown respondent's determination to be in error.

Accuracy-Related Penalty

Respondent determined that petitioners underpaid a portion of their income tax because of negligence. Section 6662(a) imposes a penalty in an amount equal to 20 percent of the portion of the underpayment attributable to negligence or disregard of rules or regulations.

Negligence is defined as any failure to make a reasonable attempt to comply with the provisions of the Internal Revenue Code, and the term "disregard" includes any careless, reckless, or intentional disregard. Sec. 6662(c). The accuracy-related penalty will apply unless petitioners demonstrate that there was reasonable cause for the underpayment and that they acted in good faith with respect to the underpayment. See sec. 6664(c)(1).

Taxpayers can avoid liability for the accuracy-related penalty if they engage a competent professional to prepare their returns, and they reasonably rely on the advice of that professional. See Freytag v. Commissioner, 89 T.C. 849, 888 (1987), affd. 904 F.2d 1011, 1017 (5th Cir. 1990), affd. 501 U.S. 868 (1991). Taxpayers must show that they provided all relevant information to the professional. See Pessin v. Commissioner, 59 T.C. 473, 489 (1972).

Applying these principles to the instant case, we conclude that petitioners have sustained their burden of establishing that reasonable cause and good faith existed for deducting legal fees on petitioner's Schedule C. Petitioner testified credibly at trial that she engaged the professional services of Ronald Stern, a C.P.A., to prepare petitioners' income tax return for 1994. Mr. Stern had prepared petitioners' income tax returns for the past 15 years. According to petitioner, Mr. Stern questioned her about the legal and professional fees because he wanted to understand what services the attorneys were performing.

Accordingly, petitioner provided him with information regarding those expenses.

The characterization of legal fees in this case as either a Schedule A or a Schedule C deduction involves analyzing and applying a set of facts to a technical area of the law. Thus, in the context of determining the correct deduction for legal expenses that touch both upon a taxpayer's employment and trade or business, it is reasonable for a taxpayer to consult and rely on a C.P.A. Here, petitioners were clearly relying on Mr. Stern to determine the proper characterization and deduction of the legal fees. Based on the record we find that petitioners have proved that their actions with respect to characterizing the legal fees as Schedule C deductions were reasonable and are not subject to the section 6662(a) accuracy-related penalty.

Respondent also contends the fact that petitioners claimed deductions in excess of what they actually substantiated warrants the imposition of the accuracy-related penalty. Petitioners were able to substantiate only a portion of the deductions that they claimed on Schedule C. Petitioners did not provide any explanation as to why they were unable to substantiate all of the legal fees that they claimed as deductions. Thus, with respect to the substantiation item, we find that petitioners have failed to show that their actions were reasonable and not made with intentional disregard of rules or regulations. Under these circumstances, we hold that petitioners are liable for the accuracy-related penalty under section 6662(a) on the portion of any underpayment attributable to the deduction of legal fees that were not substantiated.

We have considered all other arguments of the parties, and to the extent not addressed herein we find them to be either moot, meritless, or irrelevant.

To reflect the foregoing,

Decision will be entered under Rule 155.

APPENDIX D
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

1. Article III, section 1, clause 1 of the United States Constitution provides as follows:

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

2. 26 U.S.C. (I.R.C.) § 162(a) (2000) provides as follows:

§ 162. Trade or business expenses

(a) In general

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including –

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the

taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000. For purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year. The preceding sentence shall not apply to any Federal employee during any period for which such employee is certified by the Attorney General (or designee thereof) as traveling on behalf of the United States in temporary duty status to investigate or prosecute, or provide support services for the investigation or prosecution of, a Federal crime.

3. 28 U.S.C. § 2071(a) (2000) provides as follows:

§ 2071. Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

4. Federal Rule of Appellate Procedure 47(a)(1) provides as follows:

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

> **(1)** Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with – but not duplicative of – Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

5. Ninth Circuit Rules 36-1 through 36-6 provide as follows:

Circuit Rule 36-1. Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion

which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Circuit Rule 36-2. Criteria for Publication

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Circuit Rule 36-3. Citation of Unpublished Dispositions or Orders

(a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(b) Citation: Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.

Circuit Rule 36-4. Request for Publication

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request

will not be entertained unless received within 60 days of the issuance of this Court's disposition. A copy of the request for publication must be served on the parties to the case. The parties will have 10 days from the date of service to notify the Court of any objections they may have to the publication of the disposition. If such a request is granted, the unpublished disposition will be redesignated an opinion.

Circuit Rule 36-5. Orders for Publication

An order may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated when filed with the Clerk by the addition of the words "FOR PUBLICATION" on a separate line.

Circuit Rule 36-6. Periodic Notice to Publishing Companies

A list of all cases that have been decided by written unpublished disposition will be made available periodically to legal publishing companies for notation in its reports. The list shall set forth concluding disposition in each case, such as, "Affirmed," "Reversed," "Dismissed," or "Enforced."